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February 24, 2005

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FILED ELECTRONICALLY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: *Ex Parte Presentation,* CG Docket No. 04-208, CC Docket No. 98-170

Dear Ms Dortch:

Pursuant to Section 1.1206 of the Commission rules, 47 C.F.R. § 1.1206, Verizon Wireless hereby submits this letter summarizing an ex parte presentation yesterday, February 23, 2005, in the above-referenced dockets. Charon H. Phillips, together with Gregg L. Elias and the undersigned of Wiley Rein & Fielding, met with Paul Margie, Spectrum and International Legal Advisor to Commissioner Michael J. Copps, to urge the denial of the National Association of State Utility Consumer Advocates' declaratory ruling petition. The substance of the meeting was consistent with Verizon Wireless' prior filings in the above-referenced dockets, including a January 25, 2005 written ex parte and comments filed on July 14, 2004. The January ex parte filing is attached.

Respectfully submitted,

/s/R Michael Senkowski

R Michael Senkowski

cc: Paul Margie

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January 25, 2005

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 - 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: *Written Ex Parte Presentation*
CG Docket No. 04-208 – National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling
CC Docket No. 98-170 – Truth-in-Billing and Billing Format

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206(b), Verizon Wireless respectfully submits this letter to be included in the referenced dockets. The Commission should deny and/or dismiss the Petition filed by the National Association of State Utility Consumer Advocates ("NASUCA") because it asks for a declaration that would conflict with established law.

In addition, the record shows that a number of states and state regulatory commissions are regulating billing in ways that plainly exceed the boundaries of permissible state regulation of commercial mobile radio service ("CMRS") under Section 332(c)(3)(A) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 332(c)(3)(A), and Section 64.2400(c) of the Commission's Rules, 47 C.F.R. § 64.2400(c). This is the right time, and the right opportunity, for the Commission to reaffirm that such regulations interfere with the fundamental federal regulatory scheme for CMRS, that Section 332(c)(3)(A) preempts all state regulation of CMRS line items, and that Rule Section 64.2400(c) additionally bars states from adopting or enforcing billing regulations that are inconsistent with the Commission's rules and policies. Insofar as such actions would simply be interpreting and applying existing law, the Commission is free to take them now without additional notice and comment.

I. The Commission Should Deny The NASUCA Petition.

NASUCA urges the Commission to (1) prohibit all line-item charges, surcharges, or other fees, unless such charges have been expressly mandated by government law or regulation, and (2) declare that line items that are allowed must closely match those mandatory assessments.[1]

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1 Petition at 1, 66.

The record, however, clearly shows why suppressing carriers' right to inform their customers of the increasing and disparate burdens of state and local taxes, fees and regulations through line item charges would be unlawful and would not serve the public interest. NASUCA's request would force Verizon Wireless and other CMRS providers either to abandon their national and regional base rate plans and create hundreds, if not thousands, of rate plans to account for each taxing jurisdiction's separate taxes, surcharges, and fees, or to spread the cost of local taxes, surcharges and fees across nationwide rate plans. Either solution would clearly disserve the public interest. Forcing CMRS carriers to create individual rate plans tied to each local jurisdiction is all but impossible and will destroy the competitive benefits of national and multi-state rate plans. In the alternative, embedding local taxes, surcharges and fees in nationwide rate plans would result in cross-subsidization between low-tax and higher-tax jurisdictions.[2]

In any event, the Commission has already considered and denied the same relief NASUCA now seeks. The Commission squarely rejected claims previously made in the *Truth-in-Billing* proceeding by NASUCA and others that the Commission should bar wireless carriers from recovering regulatory costs through line items on customers' monthly bills.[3] The Commission stated:

> We decline at this time to mandate such requirements, but rather prefer to afford carriers the freedom to respond to consumer and market forces individually, and consider whether to include these charges as part of their rates, or to list the charges in separate line items.... Moreover, we are concerned that precluding a breakdown of line item charges would facilitate carriers' ability to bury costs in lump figures.[4]

The Commission has repeatedly affirmed carriers' rights to place line items on bills, even when such charges are not mandated by law.[5] Moreover, the record in this proceeding makes clear that

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2 *See, e.g., Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Monthly Line Items and Surcharges Imposed by Telecommunications Carriers*, CC Docket No. 04-208, Comments of Verizon Wireless at 12; Comments of Leap Wireless International, Inc. at 10-12; Comments of CTIA – The Wireless Association at 4-5.

3 *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, 7526-27 ¶ 55 (1999) ("*TIB Order*") (emphasis added).

4 *Id.*

5 *See, e.g., Federal-State Joint Board on Universal Service,* 17 FCC Rcd 24952, ¶ 42 (2002) ("carriers currently have the flexibility to recover their contribution obligations in any manner that is equitable and nondiscriminatory") ("*USF Contribution Order*"); *Telephone Number Portability*, 13 FCC Rcd 11701, 11774 ¶ 136 (1998) ("*LNP Order*"). *See also Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability*, 17 FCC Rcd 252, 255 ¶ 3 (2001) ("We will allow, but not require, incumbent LECs (ILECs) subject to rate-of-return regulation to recover their carrier-specific costs directly related to thousands-block number pooling implementation through interstate access charges. Carriers not subject to rate regulation, such as competitive LECs (CLECs) and CMRS providers, may recover their carrier-specific costs directly related

the Commission's fundamental decision to grant CMRS carriers flexibility to recover regulatory compliance costs through line items remains sound.[6] The Commission should, therefore, deny NASUCA's petition on the merits.

Furthermore, NASUCA's petition is procedurally flawed and should not be granted by the Commission. By asking the Commission to declare all non-mandated line items unlawful, NASUCA is seeking to change existing law. Under the APA, as well as the Commission's rules, declaratory rulings are by their nature an adjudication of existing law. Because NASUCA seeks to impose a new and much more restrictive rule for billing through a declaratory ruling, the Petition must be dismissed. [7]

II. States Are Imposing Disparate Billing Rules That Exceed State Authority Under Section 332(c)(3)(A) of the Act and Rule Section 64.2400(c).

A. A National Regulatory Framework Governs CMRS.

Congress has long intended that there be a national framework to govern the provision of wireless services. Since 1933, Congress has recognized that because "[n]o state lines divide the radio waves, national regulation is ... essential to the efficient use of radio facilities."[8] Through amendments to the Act, Congress has centralized authority over wireless services in the Commission, with the intent that wireless operators develop regional or nationwide systems – the same "rapid, efficient, Nation-wide, and world-wide wire and radio" systems contemplated in Section 1 of the Act.[9] In landmark legislation in 1993, Congress amended Sections 2 and 332 of the Act to strengthen the national framework for the regulation of CMRS. Amended Section 332 provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile radio service."[10] Section 2(b) was amended to exclude wireless services from the general prohibition on Commission regulation of intrastate telecommunications services, thereby exempting wireless services in part from the system of dual state and federal regulations that governs wireline telephone services.[11] Congress determined that this broad grant of federal jurisdiction was necessary in order to provide a uniform

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to implementation of thousands-block number pooling in any lawful manner consistent with their obligations under" the Act).

6 *See, e.g.,* Comments of Verizon Wireless at 6-22; Opposition to Petition of Cingular Wireless LLC at 2-8; Comments of Leap Wireless International, Inc.6-14; AT&T Corp. Opposition at 5-10; Opposition to Petition of BellSouth Corporation at 3-6; Opposition of CTIA – The Wireless Association at 3-6.

7 *See* 5 U.S.C. § 554(e); 47 C.F.R. 1.2; Comments of Verizon Wireless at 6-7.

8 *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).

9 47 U.S.C. § 151.

10 47 U.S.C. § 332(c)(3). While the amendment to Section 332 did not preclude state regulation of other terms and conditions, it did not expressly reserve states' authority to regulate, as it had done in other very limited and discrete contexts such as with respect to zoning authority (47 U.S.C. § 332(c)(7)).

11 47 U.S.C. § 152(b).

regulatory framework for all CMRS offerings, which, "by their nature, operate without regard to state lines."[12]

Courts have found that state regulatory actions are preempted where the imposition of diverse state requirements would interfere with Congressionally-created national frameworks. Indeed, with regard to the Commission's interconnection rules, the Supreme Court ruled that Congress had clearly vested the Commission with authority to adopt its national rules governing interconnection, and noted that state implementation of that federal program would "surpass strange."[13]

Chairman Powell recently reiterated this well-established principle in his statements accompanying the Commission's *Vonage* decision: "The founding fathers understood the danger of crushing interstate commerce and enshrined the principle of federal jurisdiction over interstate services in the commerce clause of the U.S. Constitution. *In the same vein, Congress rightly recognized the borderless nature of mobile telephone service and classified it as an interstate communication.*"[14]

The Commission also recently confirmed in a filing with the United States Court of Appeals for the Eighth Circuit that "[t]he ... Act ... provides the federal framework for the regulation of wireless services."[15] In describing this national framework, the Commission discussed at length Congress's amendment of Section 332 of the Act to "eliminate[] the dual federal and state frameworks for rate and entry regulation, *establishing instead a uniform 'national regulatory policy for CMRS, not a policy that is balkanized state-by-state.*'"[16] It also noted that "[s]tate regulation can be a barrier to the development of competition."[17]

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12 H.R. Rep. No. 103-111, at 260 (1993).

13 "Justice Breyer appeals to our cases which say that there is a "'presumption against the preemption of state police power regulations,'" and that there must be "'clear and manifest' showing of congressional intent to supplant traditional state police powers." But the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange." *AT&T v. Iowa Utils. Bd.*, 525 US. 366, 378 n.6 (1999) discussing *AT&T v. Iowa Utils. Bd.*,525 US at 420 (Breyer, J, concurring in part, dissenting in part) (internal citations omitted).

14 *Vonage Holdings Corporation Petition for Declaratory Ruling*, 19 FCC Rcd 22404 (2004), Separate Statement of Michael K. Powell, at 2 (emphasis added).

15 *Cellco Partnership, d/b/a Verizon Wireless, et al., v. Hatch,* Case No. 04-3198, 8th Cir., Amicus Curiae Brief of the Federal Communications Commission, p. 4 (filed Nov. 12, 2004) ("*FCC Minnesota Brief*").

16 *Id.* at 5, *citing In the Matter of Petition on Behalf of the State on Conn.*, 10 FCC Rcd 7025, 7034 ¶ 14 (emphasis added).

17 *Id.* at 7, *citing In the Matter of Petition on Behalf of the State on Conn.*, 10 FCC Rcd at 7034 n.44.

B. State Regulation of Line Items and other Billing Practices Conflicts With the Federal Framework.

The Commission has been presented with significant evidence of increasing efforts at the state level to regulate CMRS carriers with regard to billing in ways which conflict with Section 332(c)(3)(A) and the Commission's rules. Several states have adopted or proposed flat prohibitions against CMRS carriers recovering state or local taxes, surcharges or fees through line items, or have designated the amount that a CMRS carrier may recover through line items on customer bills. For example:

- The Vermont Public Service Board has proposed to prohibit carriers from itemizing a separate charge to recover the Vermont gross receipts tax imposed on carriers.[18]
- In a recent *ex parte,* Nextel cited an Indiana Utility Regulatory Commission letter prohibiting carriers from placing a line item for the Indiana Utility Receipts tax on their bills.[19]
- Colorado, by contrast, has taken a different approach by actually requiring carriers to place a specific line item on their bills.[20]
- NASUCA's Petition states that "Georgia law prohibits recovery of carrier contributions to the state universal service fund through separate surcharge." [21]
- Minnesota has adopted legislation restricting the right of carriers to increase any charge to a customer, including line items, for 60 days, and then only with customer consent.[22]

In addition to regulating whether and to what extent CMRS carriers can recover costs through specific line items on customer bills, in direct violation of Section 332's prohibition of state rate regulation, several states have adopted or proposed more general requirements that impose obligations on CMRS providers that are inconsistent with those in the Commission's current truth-in-billing rules applicable to CMRS carriers.

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18 *See* Public Service Board Proposed Rule 7.617(c).

19 Letter of Christopher R. Day, Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 22, 2004).

20 *See,* 4 Colo. Code Regs. § 723-41-2.3. This provision provides that "The HCSM rate element shall be applied to the Retail Revenues of each telecommunications service provider's end-user and shall appear as a line item on the monthly bill of each such end-user."

21 NASUCA Petition at 65 n. 170.

22 2004 Minn. Sess. Law Serv. 261 ("Article 5"). Verizon Wireless and other carriers filed suit challenging the lawfulness of Article 5 in Federal district court, including the fact that Article 5 seeks to prevent carriers from changing the rates such as the Federal universal service that the FCC permits but does not mandate carriers to pass through to customers, and the case is now before the Eighth Circuit. *Cellco Partnership d/b/a Verizon Wireless et al. v. Hatch,* No. 04-3198 (8th Cir. 2004).

When the Commission adopted the *TIB Order,* it specifically *exempted* wireless carriers from certain rules, which are "inapplicable or unnecessary in the CMRS context."[23] For example, the Commission concluded that "because CMRS carriers are excluded from equal access obligations, it appears that CMRS carriers will seldom need to indicate a new long distance service provider on the bill."[24] Nevertheless, the California Public Utilities Commission ("CPUC") has adopted new rules which apply the precise obligations the Commission has already deemed to be "inapplicable or unnecessary" for CMRS.[25] CPUC Rule 6(d) states: "Telephone bills shall clearly and conspicuously identify any change in service provider, including identification of charges from any new service provider." Rule 6(c) states: "Where charges for two or more carriers appear on the same telephone bill, the charges must be separated by service provider. This rule does not apply to wireless roaming charges."

The Commission also exempted CMRS carriers from the "clear and conspicuous" requirements in Rule Section 64.2401(b)[26] because there was no evidence to indicate that CMRS providers failed to provide consumers with clear and non-misleading information they needed to make informed choices.[27] The Commission's decision constitutes an explicit finding that CMRS bills should *not* be regulated in this regard, at least during the pendency of the *TIB Further NPRM.* In direct conflict with the Commission's decision on this point, however, several states have adopted or proposed rules that impose these obligations on CMRS carriers. For example, the California[28] and New Mexico[29] rules would apply to CMRS virtually the same requirements

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23 *TIB Order*, 14 FCC Rcd at 7502 ¶ 17.

24 *Id.*, 14 FCC Rcd at 7502 ¶ 16.

25 *Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to all Telecommunications Utilities*, 2004 Cal. PUC LEXIS 240 (2004).

26 *See* 47 C.F.R. § 64.2401(b) ("Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading plain language description of the service or services rendered. The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged").

27 *TIB Order*, 14 FCC Rcd at 7502 ¶ 16. The record in this proceeding contains no credible evidence that CMRS providers fail to provide consumers with clear and non-misleading information they needed to make informed choices and many carriers have voluntarily taken additional steps to ensure that consumers have access to information they need to make informed choices. *See* Comments of Verizon Wireless at 22-31; Comments by AT&T Corp. at 16; Comments of CTIA – The Wireless Association at 3; Comments of Cingular at 8; Comments of Nextel Communications, Inc. and Nextel Partners, Inc. at 11; Reply Comments of Leap Wireless International, Inc. at 1-2; Reply Comments of T-Mobile USA, Inc. at 3-6.

28 *See* CPUC Rule 6(e) of G.O. 168 ("Any carrier or billing agent that charges subscribers for products or services on a telephone bill shall include, or cause to be included, in the telephone bill the amount being charged for each product or service, and a clear and concise description of the service, product, or other offering for which a charges has been imposed. The description must be sufficiently clear in presentation and specific in content so that customers can accurately assess that the services for which they

that the Commission has declared do not apply to CMRS. Vermont proposes to apply a similar rule to wireless carriers.[30] The states' adoption of such rules is in clear conflict with the Commission's decision to exempt CMRS bills from this form of regulation.

C. State Regulation Undermines the Federal Regulatory Framework for CMRS.

In addition to conflicting with the Commission's federal scheme for truth-in-billing regulation, the states' attempts to direct how or whether CMRS providers recover contributions to state programs from their customers undermine Congress' and the Commission's intent to develop a nationwide regulatory structure for CMRS. Like many other CMRS providers, Verizon Wireless recovers the costs of state and local taxes, surcharges, and fees through separately stated line items on its customers' monthly bills. This allows nationwide carriers to maintain the uniform national base rate plans that consumers demand, while ensuring that they recover the costs associated with state and local taxes, surcharges and fees from consumers in the localities imposing such charges.

Nevertheless, states are attempting to utilize truth-in-billing regulations to impose burdensome and contradictory regulation on CMRS carriers. One example of inconsistent state rules that have created operational costs are the California and New Mexico rules dealing with billing for non-communications services. New Mexico effectively bars carriers from billing for non-communications services.[31] California, on the other hand, permits carriers to bill for non-communications services, but requires carriers to bill for such services in one or more separate sections of the telephone bill clearly labeled "Non-communications-related charges."[32] As a consequence, CMRS carriers must develop California-specific bills and/or New Mexico-specific bills. As detailed in a recent *ex parte* submission, such balkanized regulation is precisely the

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are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged"). The California Commission has granted extensions of time to certain carriers to comply with certain rules. In addition, the CPUC is considering whether to stay its rules.

29 In 1999, New Mexico adopted "interim" rule N.M. Admin. Code tit. 17, §13.11.2.2 (Chapter 11 "Telecommunications" of Title 17 of the N.M. Admin. Code was filed as Chapter 13), which provides that any person that places charges on a customer's telephone bill must "include a brief, clear and conspicuous description of the product, service, or change in provider to be placed on the customer's bill, including the amount charged for each product, service, or change in provider or service (including taxes and surcharges). The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the service for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged."

30 *See* Vermont Public Service Board Proposed Rule 7.617(B)(3) which requires bills to contain "[a] brief, non-misleading, plain language description of the product, service or services rendered, sufficient to allow the customer to determine whether the bill accurately reflects the service that the customer requested and received.

31 N.M. Admin. Code tit. 17, §13.7.6.2 and 13.9.3.

32 CPUC Rule Part 4, H(2) of General Order No. 168.

harm Congress and the Commission intended to prevent through the nationwide regulatory scheme for CMRS.[33]

The record here demonstrates that subjecting carriers to a patchwork of conflicting regulatory obligations regarding line items will undermine carriers' ability to continue offering the national or multi-state rate plans that have promoted vigorous competition in the industry.[34]

Based on the clear intent for a nationwide regulatory scheme for CMRS, and the adverse effect on customers and competition that would result from balkanized regulation, the Commission should take this opportunity to declare that state truth-in-billing regulation which either limits or constrains a CMRS carrier's ability to recover costs through specific line items or otherwise conflicts with the Commission's truth-in-billing rules is preempted.[35] Verizon Wireless submits that the Commission has the opportunity and authority to make such determinations in *this* proceeding, based upon existing statutory, regulatory and case law. Indeed, the Commission has already recognized that imposing state-based restrictions on an industry that prices, markets, and provides service on a nationwide basis would "effectively trump the deregulatory federal regime beyond – as well as within – the borders of the particular state."[36]

III. State Regulation that Restricts CMRS Carriers' Line Items or that is Inconsistent With the Federal Regime for CMRS Should Be Preempted.

A. Line Item Regulation Constitutes Rate Regulation Preempted Under Section 332(c)(3)(A).

It is well settled that the Commission has broad authority over CMRS pursuant to Section 332(c) of the Act. The Commission relied upon this authority when it adopted its truth-in-billing rules, stating that Section 332 provides it "with jurisdiction to enact [truth-in-billing] rules

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33 *See, e.g.,* Letter of Christopher R. Day, Counsel, Government Affairs, Nextel Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Dec. 22, 2004).

34 *See* Comments of Verizon Wireless at 8-13; Reply Comments of Verizon Wireless at 7-8; Comments of CTIA at 3-14; Comments of Nextel Communications, Inc. and Nextel Partners, Inc. at 12-19; Comments of the Coalition for a Competitive Telecommunications Market at 10-12; Comments of Leap Wireless International, Inc. at 7-12; Reply Comments of T-Mobile at 7-9.

35 Federal law preempts state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Federal Sav. And Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982). Federal regulations can have the same preemptive effect as a federal statute and where Congress has directed an agency to regulate, an agency decision to preempt state regulation is subject to judicial review only to determine whether it has exceeded its statutory authority or acted arbitrarily. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988); *United States v. Shimer*, 367 U.S. 374, 381-382 (1961).

36 *FCC Minnesota Brief* at 18-19.

concerning CMRS carriers."[37] Under Section 332(c)(3)(A), and its conforming amendment to Section 2(b):

> . . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.[38]

The Commission has made clear that, for purposes of Section 332(c)(3)(A), the concept of "rates" includes "rate elements" and "rate structures."[39] Moreover, the Commission has repeatedly made clear that line item surcharges are "rate elements."[40] The Act thus preempts states from regulating line items on the bills of CMRS providers.

Furthermore, the Commission has already found that a state requirement that CMRS carriers recover contributions to state programs through their rates, rather than a separate line item, would constitute unlawful rate regulation.[41] Specifically, in concluding that a Texas statute requiring CMRS carriers to contribute to state universal service funds was lawful under Section 332(c)(3)(A), the Commission found that because the statute did "not direct the CMRS providers to recover their contributions" to the state universal service programs "through the rates they

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37 *TIB Order,* 14 FCC Rcd at 7503, ¶ 21 n.35.

38 47 U.S.C. § 332(c)(3)(A).

39 *Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 FCC Rcd. 19898, 19907 ¶ 20 (1999) ("*SBMS Order*") (finding "that the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers"). The Commission confirmed this conclusion in its recent brief before the United States Court of Appeals for the Eighth Circuit. *See FCC Minnesota Brief* at 17.

40 *See, e.g., USF Contribution Order,* 17 FCC Rcd at 24979, ¶ 53 n.133 ("incumbent local exchange carriers are required to recover their federal universal service contribution costs through *a line item*, which may be combined for billing purposes with *another rate element*") (emphasis added); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service*, 15 FCC Rcd 12962, 13057-58, ¶¶ 218-19 (2000) (approving plan permitting local phone companies to establish a "*separate rate element (e.g., line item)*" to recover federal universal service contributions) (emphasis added).

41 *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 1735, 1737 ¶ 4 (1997); *see also Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 432 n.64 (5th Cir. 1999) ("A state commission could require a universal service contribution based on end-user revenues but leave the carrier free to set its rates as it pleases while not blocking new carriers from the market. On the other hand, a state commission would be regulating "rates and entry" if it required the carriers to lower rates for one group of customers as part of an implicit subsidy").

charge their customers, . . .the Texas statute does not implicate the prohibition on state regulation in section 332(c)(3)."[42] On appeal, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's interpretation of Section 332(c)(3)(A).[43]

In short, a statute that regulates how CMRS providers recover contributions to state programs violates the prohibition on state regulation of rates in Section 332(c)(3)(A) of the Act. As discussed in Section II.B above, however, certain states have adopted or proposed regulations to govern how CMRS carriers in fact recover state or local taxes, surcharges, or contributions from their customers. The Commission should expressly declare such state requirements to be preempted as rate regulation under Section 332(c)(3)(A) of the Act. As discussed in more detail below, there has been adequate notice and opportunity for comment for the Commission to make this declaration in this proceeding.[44]

B. State Rules That Conflict with the Federal Regulatory Scheme for Wireless Services are Peempted.

In addition to the express preemption of Section 332(c)(3)(A) of the Act, the Commission may preempt state regulation when it is necessary to protect a valid federal regulatory objective and "state regulation would 'negate[ ] the exercise by the Commission of its own lawful authority. . . .'"[45] In this regard, where a federal agency has chosen to pursue regulation with a light hand – as the Commission has chosen with respect to truth-in-billing for CMRS carriers and Congress has mandated for CMRS in general – the imposition of additional, burdensome and inconsistent state rules is in direct conflict with the achievement of that goal.[46]

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42 *Pittencrieff Communications,* 13 FCC Rcd at 1754 ¶ 37.

43 *See Cellular Telecomm. Indus. Ass'n v. FCC,* 168 F.3d 1332, 1336-37 (D.C. Cir. 1999).

44 *See Conference of State Bank Supervisors, et al. v. Office of Thrift Supervision, et al.,* 792 F.Supp. 837, 844 (D.D.C. 1992) (finding that the OTS was not required to provide specific notice that agency action would preempt state law where the Plaintiff had sufficient notice to comment meaningfully on this subject).

45 *Pub. Serv. Comm'n of Maryland v. FCC,* 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 880 F.2d 422, 429-31 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC,* 883 F.2d 104, 113 (D.C. Cir. 1989); *Public Util. Comm'n of Texas v. FCC,* 886 F.2d. 1329, 1331-33 (D.C. Cir. 1989)); *Computer and Communications, ETC. v. FCC,* 693 F.2d 198, 215 (D.C. Cir. 1982) (finding that the Commission had authority to preempt state tariffing requirements for customer premises equipment charges to promote the federal goal of promoting the efficient utilization and full exploitation of the interstate telecommunications network); *People of State of California v. FCC,* 567 F.2d 84, 86-87 (D.C. Cir. 1977).

46 In its recent decision in *Vonage Holdings Company,* the Commission barred the application of traditional state telephone company regulation to Vonage's DigitalVoice service precisely because the state regulations conflicted with the Commission's "pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as DigitalVoice." *Vonage Holdings Co. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* 19 FCC Rcd 22404 ¶¶ 20-22 (2004). *See also An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems,* 86 FCC 2d

Such is the case here. As discussed above, states have adopted or proposed inconsistent and additional billing requirements on CMRS providers that conflict with the Commission's truth-in-billing regulations by imposing obligations on CMRS providers that the Commission expressly determined to be inapplicable or unnecessary for CMRS. The Commission should declare such state requirements to be preempted because they directly conflict with Congress' and the Commission's intent to develop a uniform, nationwide regulatory structure for CMRS.

Section 64.2400(c) gives the Commission an additional legal basis for declaring such state actions to be preempted. The Commission's existing truth-and-billing rules provide that such rules "are not intended to preempt the adoption or enforcement of consistent truth-in-billing requirements by the states."[47] As the Commission explained in the *TIB Order,* "states will be free to continue to enact and enforce additional regulation *consistent with* the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today."[48] Put another way, states have authority to adopt or enforce truth-in-billing requirements only to the extent such requirements do not conflict with the Commission's rules. State efforts to impose requirements on CMRS carriers from which the Commission has determined CMRS carriers should be exempt, are on their face inconsistent with the Commission's rules. The Commission can and should declare such state requirements to be preempted under Section 64.2400(c) of the Commission's rules.

Section 64.2400(c) does not stand as a bar to a Commission declaration that state regulation of how CMRS providers recover government-imposed fees and costs is unlawful rate regulation under Section 332(c)(3)(A) of the Act. Section 64.2000(c) provides no authority to the states to regulate line item surcharges. As discussed above, state regulation of line item surcharges constitutes unlawful rate regulation preempted by Section 332(c)(3)(A) of the Act. Section 64.2400(c) does not trump the statute. Furthermore, Section 64.2400(c), by its terms, applies only to the requirements in Part 64, Subpart Y of the Commission's regulations. This subpart contains no rule governing carriers' use of line items on customer bills and thus state regulation on this matter is, by definition, outside the scope of Section 64.2400(c).

IV. The Commission Can Take These Actions in Response to the NASUCA Petition.

The NASUCA Petition together with the *TIB Further NPRM* provide the Commission the opportunity to make the necessary clarifications regarding state regulatory authority over CMRS truth-in-billing matters without additional notice and comment. The APA provides in pertinent part that:

469, 504 ¶ 82 (1981) (preempting state regulation over technical standards and market structure for cellular service because any state licensing or franchising requirements in "addition to or conflicting with" the federal requirements "could frustrate federal policy"). Notably, in that case the Commission simultaneously decided not to impose cellular service quality standards but also to preempt state regulation of service quality, in order to allow competitive market forces to drive service quality.

47 47 C.F.R. § 64.2400(c).

48 *TIB Order,* 14 FCC Rcd at 7507 ¶ 26.

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.[49]

But the APA expressly exempts "interpretive rules" from this notice requirement.[50] Thus, an agency can "declare its understanding of what a statute requires" without notice and comment.[51] To determine whether an agency action is an interpretive, exempt from notice and comment requirements, the courts look to "whether the [agency's action] effectively amends a prior legislative rule."[52] Simply put, a rule is interpretive if it "confirm[s] a regulatory requirement, or maintain[s] a consistent agency policy."[53]

Confirming that Section 332(c)(3)(A) and Section 64.2400(c) preempt state regulation of line items or other billing regulations that are inconsistent with the Commission's rules would not require the Commission to "work substantive changes" in the law or regulation, or to repeal or "repudiate" the existing law or regulation.[54] Rather, these declarations would illustrate and clarify the fundamental significance of Section 332(c)(3)(A) and Section 64.2400(c) as they relate to state efforts to adopt and enforce truth-in-billing regulation. This is precisely what an interpretive ruling is intended to accomplish.[55]

Moreover, parties to this proceeding have had notice and have commented extensively on the issues associated with preemption and state billing regulations. The Commission's pending *TIB Further NPRM* requested comment on the general issues of (1) whether to impose the wireline-only truth-in-billing rules on CMRS providers, and (2) standardized labels for charges resulting from federal regulatory action. The NASUCA Petition raised issues relating to the use of line item charges and the characterization of such charges on customer invoices. The Commission issued public notice of the *TIB Further NPRM* in the Federal Register.[56] The Commission also issued public notice of the NASUCA Petition in the Federal Register and that

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49 5 U.S.C. § 553(b)(3).

50 *Id.* § 553(b)(3)(A).

51 *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

52 *American Mining Cong. v. Mine Safety & Health Administration*, 995 F.2d 1106,1112 (D.C. Cir. 1993).

53 *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992).

54 *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

55 *See id., see also Sentara Hampton General Hosp. v. Sullivan*, 799 F.Supp. 128 (D.D.C. 1991) (interpretive rules may effectuate important public policy goals, but they are not binding legislative rules if they merely remind the public of existing duties without changing significant obligations and liabilities).

56 64 Fed. Reg. 34499 (June 25, 1999).

notice specifically reflects the fact that the petition raises issues addressed in the *Truth-in-Billing* proceeding.[57]

Parties submitted comment on both the *TIB Further NPRM* and the NASUCA Petition addressing issues regarding preemption and state billing regulations.[58] NASUCA itself raised preemption in the line item billing context in its Petition, by asserting that significant regulation of carrier billing practices is lawful, stating:

> Of course, if the federal, state or local law prohibits recovery of the particular cost by means of line item charges, then carriers could not, by virtue of the Commission's declaratory ruling, nonetheless impose such charges in violation of the law. For example, Georgia law prohibits recovery of carrier contributions to the state universal service fund through separate surcharges.[59]

Further, in its comments the California Public Utilities Commission specifically referenced Section 64.2400(c), stating that that "the Commission explicitly allowed the states to adopt and enforce their own truth-in-billing requirements as long as they are consistent with the Commission's."[60] The Minnesota Department of Commerce argued that the "Commission should recognize that states are in some cases the appropriate venues in which to handle misleading surcharges and fees" and "[w]hatever decision the Commission makes in this docket, it should recognize that states play an important role in enforcing their consumer protection laws."[61]

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57 69 Fed. Reg. 33021 (June 14, 2004).

58 In a given proceeding, the Commission may act on matters that are the "logical outgrowth" of issues that have been placed on public notice. *See Arizona Public Service Co. v. EPA*, 211 F.3d 1230, 1299 (D.C. Cir. 2000); *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1059 (D.C. Cir. 2000) *National Mining Ass'n*, 116 F.3d at 531; *Fertilizer Inst.*, 935 F.2d at 1311. An agency action is a logical outgrowth if "the purposes of notice and comment have been adequately served, and where interested parties could reasonably have anticipated the final rulemaking from the draft rule." Notice must provide exposure to diverse public comment, fairness to affected parties, and an opportunity to develop evidence in the record. *See National Mining Ass'n,* 116 F.3d at 531. The courts have found that comments in the record may provide an indication that notice was adequate. *Id.; see also Conference of State Bank Supervisors*, 792 F.Supp. at 844.

59 NASUCA Petition at 65 n.170. In addition, on January 14, 2005, NASCUA filed notice of *ex parte* meetings on January 12. 2005, in which NASCUA raised objections to "the wireless carriers' arguments that the Commission ought to preempt state laws governing their billing practices and descriptions." Letter by Patrick W. Pearlman, Deputy Consumer Advocate to Marlene Dortch, Secretary, Federal Communications Commission, at 2 (date Jan. 14, 2005). The analysis presented by Verizon Wireless in this letter responds to NASUCA's objections with regard to federal preemption of state billing regulation.

60 CPUC NASUCA Comments at 4 n.1.

61 Minnesota DOC NASUCA Comments at 2-3. The Minnesota DOC also stated that a decision "would only apply to the lawfulness of fees tied to interstate service by interexchange carriers" but "would assist states in deciding whether similar intrastate charges should be questioned and prohibited."

CMRS carriers, in turn, urged the Commission to preempt state regulation with respect to prescribing billing format and content, including line item charges.[62] In reply, NASUCA argued that "[r]egulation of billing and advertising practices is not a regulation of the carriers' charges," and that such regulation constitutes "other terms and conditions" under Section 332(c)(3)(A).[63] NASUCA argued further that Nextel's preemption argument "blur[s] the distinction between rate regulation and terms and conditions regulation" and that states are not "preempted from addressing CMRS carriers' line items."[64] Thus, the parties in this proceeding have clearly had notice of and commented on the important issues related to preemption and state regulatory authority over CMRS billing.[65]

In sum, Verizon Wireless submits that Commission action to clarify the scope of state regulatory authority with regard to these truth-in-billing matters is entirely appropriate and lawful in its order responding to NASUCA's petition. Verizon Wireless, therefore, urges the Commission to take this opportunity to reaffirm that state billing regulation that is inconsistent with the federal regulatory scheme for CMRS is preempted. Specifically, the Commission should declare that Section 332(c)(3)(A) and 47 C.F.R. e Section 64.2400(c) bar all state regulation of CMRS billing line items, as well as billing regulations that are inconsistent with the Commission's rules.

Very truly yours,

John T. Scott, III

John T. Scott, III

cc: Jeffrey Dygert
Genaro Fullano
David E. Horowitz
Leon Jackler
Jay C. Keithley
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62 Comments of Nextel Communications, Inc. and Nextel Partners, Inc. at 30-44; Leap Wireless NASUCA Comments at 17-18; Reply Comments of Verizon Wireless at 8-10; Reply Comments of T-Mobile USA, Inc. at 12-14.

63 NASUCA Reply Comments at 14-15, 57.

64 *Id.* at 57.

65 *See Conference of State Bank Supervisors*, 792 F.Supp. at 844.